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IN THE SUPREME COURT OF PENNSYLVANIA.
WESTERN DISTRICT

THOMAS A. McKNIGHT, WILLIAM McKNIGHT, HARRY W. FAHL, JOSEPH J. PETTI, CHARLES H. STEWART, JR., JUDD H. GRANT, H. ROBERT DAWSON, WILLIAM J. TORSO, AND MICKEY ROMANSKY,

Appellants,

v.

THE BOARD OF PUBLIC EDUCATION, B. H. KIRKPATRICK, J. H. BIALAS, DR. A. L. LEWIN, DR. LAWRENCE E. VAN KIRK, GEORGE E. WALTERS, MRS. WILLIAM C. RIDGE, JUDGE JAMES H. GRAY, MRS. J. K. B. HARE, A. REX FLINN, MRS. F. B. CHALFANT, J. ROY DICKEY, W. H. COSGROVE, G. W. GERWIG, LAURA M. BRAUN, AND HOMER S. BROWN,

Appellees

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellants file their statement disclosing the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question pursuant to Rule 12 (1) of the Rules of the

Supreme Court of the United States, as amended April 6, 1942.

Opinion Below

The court below wrote an opinion. It is reported in 76 Atl. 2d 207. The opinion of the court below is contained in Appendix A to this statement, which is made a part hereof.

Questions Presented

I

Did the appellees and the Supreme Court of Pennsylvania construe the separation clause of the First Amendment to the United States Constitution contrary to the intent of the framers of the amendment because they precluded the state from allowing religious assemblies in public civic centers while permitting other types of assemblies?

II

Does the construction of the Act of May 18, 1911 (Pennsylvania Public Law 309) as amended by Act of March 31, 1927 (Pennsylvania Public Law 87) so as to prohibit religious assemblies in the school buildings of Pennsylvania abridge appellants' freedoms of assembly, speech and worship contrary to the First and Fourteenth Amendments to the United States Constitution?

III

Does the construction of the said Public Laws of Pennsylvania so as to prevent religious assemblies by the appellants while allowing similar and other meetings by all other groups in the public school buildings of Pennsylvania abridge the civil liberties of appellants contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution?

Statutes Involved

This case draws into question the validity of state legislation known as the School Code of Pennsylvania, being Act of May 18, 1911, Public Law 309, Pennsylvania School Code 627, as amended by the Act of 1921 and the Act of March 31, 1927, Public Law 87.

The Act of May 18, 1911, Public Law 309, commonly known as the School Code, Section 627, provides:

> The board of school directors of any district may permit the use of its school grounds and buildings for social, recreation, and other proper purposes, under such rules and regulations as the board may adopt, and shall make such arrangements with any city, borough, or township authorities for the improvement, care, protection, and maintenance of school buildings and grounds for school, park, play, or other recreation purposes, as it may see proper, and any board of school directors may make such arrangements as it may see proper, with any association or individual for the temporary use of school property for schools, play grounds, social, recreation, or other proper educational purposes.

Section 627 of the Act of May 18, 1911, Public Law 309, was amended by the Act of May 20, 1921, Public Law 958, by substituting for the words "with any association or individual" the words, "with any officials or individuals", and by adding at the end of said original section the words "primaries and elections".

Said Act of 1911, as amended by the Act of 1921, was further amended by the Act of March 31, 1927, Public Law 87, by adding the following paragraph:

> The Board of school directors of any school district shall have power and authority to lease any part of their respective school building, equipment, and premises to any university or college of the Common-

> wealth, approved by the State Council of Education, for the purpose of conducting and maintaining therein university or collegiate courses. Such leases shall be subject to the terms and regulations which may be adopted by the board of school directors, and shall be further subject to the approval of the State Council of education.

Pursuant to the provisions of the School Code the appellees construed the law so as to not include use by religious organizations. This interpretation was considered mandatory because of the doctrine of separation of church and state which is explicit in the Constitution of Pennsylvania and the First Amendment to the United States Constitution. To carry such interpretation of the Constitutions and the statute into effect the appellees adopted Section 416 of the Rules of the Board of Public Education of Pittsburgh, which reads as follows:

> Permits shall not be granted to anyone for any religious or sectarian purpose.

The above statute was construed and applied to the admitted allegation of facts showing that the appellants are entitled to use the school auditorium as requested and that the appellees discriminated against the appellants in their exercise of the right of freedom of speech and freedom of assembly and freedom of worship, being guaranteed against abridgment by the First and Fourteenth Amendments to the United States Constitution by allowing other groups to use the auditorium of the Schenley High School in Pittsburgh.

Constitutional Provisions Involved

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellants rely upon read as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Matters Related to Jurisdiction

Timeliness

The judgment of the Supreme Court of Pennsylvania affirming the judgment of the Court of Common Pleas of Allegheny County was entered November 30, 1950. On January 3, 1951 the Supreme Court entered an order granting appellants' motion for leave to file out of time a petition for reargument. The petition for reargument was duly filed and considered by the Court below. On February 6, 1951 the petition for reargument was denied. The judgment affirming the judgment of the trial court became final on February 6, 1951. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498. This appeal is duly presented and filed within the time after the judgment became final. The appeal is timely.

Nature of Case

This is an action for a writ of mandamus brought by the appellants in the Court of Common Pleas of Allegheny County at Pittsburgh to compel the issuance of a permit to allow the appellants to use the Schenley High School Audi-

torium opened up by the appellees for purposes of public assembly.

How Constitutional Questions Raised

In Paragraph IV of the complaint it is alleged that the appellees abridged the appellants' rights under the federal Constitution contrary to the First and Fourteenth Amendments. See the Record, pages 3a-4a. In Paragraph X of the complaint the appellants alleged that there was a denial of rights that are guaranteed by the federal Constitution. See the Record page 8a. In Paragraph XIII of the complaint the appellants alleged that the Act of May 18, 1911, Public Law 309, Section 627, as amended by the Act of March 31, 1927, Public Law 87, has been construed and applied in a manner so as to bring it in conflict with the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of the United States because the appellants had been denied freedom of speech and freedom of assembly by the appellees under the statute. See the Record, pages 9a-10a.

Upon appeal from the Court of Common Pleas to the Supreme Court of Pennsylvania the appellants duly raised the questions presented upon this appeal by filing with the Court as required by Rule 22 of the Rules of the Supreme Court of Pennsylvania the statement of questions to be argued, raising each of the federal questions presented to the Court of Common Pleas in the petition for writ of mandamus. See the Record at pages 36a-37a. The statement of questions now takes the place of assignments of error under the Rules of the Supreme Court of Pennsylvania. See Rule 22 of the Rules of the Supreme Court of Pennsylvania.

The Supreme Court of Pennsylvania found that the federal questions were presented. The court said that ap-

pellants contend that the construction of the statute so as to deny appellants use of the auditorium while permitting it to others "amounts to an unconstitutional application of the Pennsylvania statute and authorizes said board to permit the use of schools in an unconstitutional manner".

Again the court recognizes the contentions wei made when, in its opinion, the court stated that the denial of the use of the auditorium to appellants "effected a denial of equal protection of the laws in that there could not be conferred on the board 'power to arbitrarily exclude one class of permissive use of the auditorium while allowing another class of permissive use. It was their duty to make the buildings available to all classes of persons when they were made available to any one group for meeting purposes.' "

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code or 28 U. S. C. 1257 (2).

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Judgment Below Not Supported by Adequate Non-federal Ground

The court below averted a discussion of the federal questions raised by construing the statute so as to fix discretion in the school board to discriminate and violate the equal protection clause. The court held that the statute conferred absolute discretion in the appellees to select whom they desired to permit to use the school auditorium

under the statute. The court below, notwithstanding the universal rule that on demurrer the pleading attacked must be favorably construed so as to indulge all intendments in favor of the pleading attacked, held that the pleading was subject to demurrer because the complaint did not "contain any averment that any group has been accorded use of the premises for religious and sectarian purposes". This conclusion did not comport with the Pennsylvania rule of pleading that all fair and reasonable inferences from the complaint must be deduced. *Price* v. *Conway*, 134 Pa. 340; *Robert Grace Contracting Co.* v. *Norfolk and Western Ry. Co.*, 259 Pa. 241. The holding of the court below was contrary to the decision of this Court in *Williams* v. *Kaiser*, 323 U. S. 471, at pages 473-474, where it is held that all of the facts alleged must be assumed to be true when the state court denies a hearing by sustaining a demurrer. In that case this Court held, in a situation similar to that here, that the non-federal question was not sufficient to support the holding of the state court.

The Supreme Court of Pennsylvania indulged in an excursion outside of the record into the realm of conjecture to state that a "finding that any other person or persons similarly situated has been permitted the use which has been denied to appellants could not properly be made". This egregious speculation on the part of the Supreme Court of Pennsylvania followed the trial court into the field of evidence on a consideration of the complaint when there had not been any evidence taken and appellants had not had the opportunity to offer proof or cross-examine the judges of the court of Common Pleas. They said that appellants had previously held a series of meetings and that various kinds of meetings and uses were permitted by the appellees. (27a) [1] Then the judges of the Court of

[1] Numbers in parentheses refer to pages of printed Record.

Common Pleas gratuitously testified when they sustained the demurrer, saying that the allegations were not sufficient and added that if they were they "would not be true". (30a) Had appellants been able to present their proof by having their day in court, which was denied, they would have proved that the appellees permitted Dr. Hewlitt I. Johnson, the Dean of Canterbury, London, England, known as "the Red Dean of Canterbury" to hold a public meeting in Pittsburgh in the Frick School Auditorium on Friday, December 17, 1948, subsequent to the date of appellants' application but prior to September 6, 1949, the date of the opinion of the Court of Common Pleas.

The attempt by the court below to shortcircuit the allegations of discrimination on the grounds that there was no "averment that any group has been accorded use of the premises for religious and sectarian purposes" with permission by appellees does not constitute a sufficient non-federal ground on which to support the ruling made by the court below. Assuming for the purpose of argument that other religious organizations had not been permitted to hold assemblies in the public schools of Pittsburgh, yet it is alleged and must be admitted by the appellees that other types of public assemblies, such as political and others, have been permitted in the school auditoriums of Pittsburgh. The denial of religious assemblies and permitting of non-sectarian assemblies in the schools constitutes discrimination. The allegation of such facts brings the appellants squarely under the provisions of the equal protection clause of the Fourteenth Amendment of the United States Constitution. See the first ground of the discussion hereinafter made appearing under the heading, "The Questions Are Substantial".

The non-federal ground is not a tenable one. Review by this Court can not be averted by a non-federal ground

"so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question". *Enterprise Irrigation District et al.* v. *Farmers Mutual Canal Company et al.*, 243 U. S. 157, 164. See also *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 22; *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464, 475-476; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.

The courts below have unreasonably used a rule of state pleading to avoid a decision on a federal question contrary to the holding of this Court in *Davis* v. *Wechsler*, 263 U. S. 22, 24-25.

The state courts can not take refuge behind the fact that the act confers discretion on the school board. Discretion is not synonymous to discrimination. Granting discretion does not authorize the school boards to permit the auditoriums to be used for political campaigns and at the same time deny them to religious campaign speakers.

It is apparent from the opinion of the Court of Common Pleas (see the Record, pages 21a-31a) and the opinion of the Supreme Court of Pennsylvania appearing in the Appendix to this statement that the so-called non-federal ground of discretion conferred on the appellees is not independent of the equal protection of the laws quested presented under the Fourteenth Amendment. This Court has said where "the non-federal ground is so interwoven with the other as not to be an independent matter, . . . our jurisdiction is plain." *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 164.

It can not be contended that mandamus is not the proper remedy under Pennsylvania procedure. It was not contended in either of the courts below that mandamus was not available if the appellants showed that they had a constitutional right to use the auditorium. It has been held

that mandamus is a proper remedy to determine the denial of constitutional rights in connection with the arbitrary and capricious refusal to issue a permit. *Commonwealth ex rel. Century Company* v. *Philadelphia,* 176 Pa. 588; *Johnson* v. *State Board of Veterinary Medical Examiners,* 46 Pa. Super. Ct. 279; *Streibert* v. *Board of Directors of School District of City of York,* 339 Pa. 119.

The supposed discretion of appellees was exercised to an end or purpose not justified by the law and was clearly against the decisions of this Court which define the fundamental law of the land, and clearly establishes an arbitrary and capricious abuse of discretion. This Court commanded the issuance of a writ of mandamus against the Board of Education in the case of *McCollum* v. *Board of Education,* 333 U. S. 203. In that case the Court reversed the holdings of the Illinois court and remanded the case for further proceedings consistent with the Court's opinion. 333 U. S. at page 212. See also *Danskin* v. *San Diego Unified School District,* 28 Cal. 2d 536, 171 P. 2d 885.

In a case similar to this the Court said: "We do not find that the decision of the state court turns on any procedural question. The action was for mandamus, but it does not appear that the remedy would have been deemed inappropriate if the asserted federal right had been sustained." *Missouri ex rel. Gaines* v. *Vanada,* 305 U. S. 337, 352. In the above case the Court added: "We must conclude that in so doing the court denied the federal right which petitioner set up and the question as to the correctness of that decision is before us." 305 U. S. at page 352.

It is respectfully submitted that although neither the Court of Common Pleas or the Supreme Court of Pennsylvania discussed the constitutional questions involved, they were properly raised and are now properly presented to this Court for determination under the equal protection of

the laws clause of the Fourteenth Amendment. No adequate and completely independent non-federal ground exists in this case. This Court, on the contrary, has jurisdiction because there is presented a substantial federal question as will hereinafter be shown.

Statement of the Case

The complaint in an action for mandamus was filed by the appellants against the appellees. (2a-3a) It was a class action brought to compel the appellees to issue to the appellants a permit to use Schenley High School Auditorium for religious assemblies. Appellants alleged that they have been unlawfully denied their rights of assembly and discriminated against by the appellees, contrary to the Federal Constitution since appellees permitted other persons freely to use said school auditorium for the purpose of holding private and public meetings and gatherings. (4a)

The complaint alleged that a written application was made and that it was denied because appellants planned to use the Schenley High School Auditorium for "religious" and a "sectarian purpose". (4a-6a) Appellants alleged that they were willing to pay any fee required and to protect the property against injury as well as to comply with any other conditions required by the appellees. (7a)

It was alleged that the lectures planned to be given at the assemblies in the auditorium were to show why man has failed to build a better world. The imminence of the battle of Armageddon, which will deliver mankind from oppression and a way whereby mankind may enjoy perfect government, permanent peace, health, prosperity and everlasting life, would be shown from the Bible. (7a-8a) Appellants alleged that they came within the provisions of the law authorizing a use of the school auditorium and that it was the appellees' ministerial duty to issue the permit.

(8a-9a) It was also alleged that the denial of the permit and permitting others to have the same or similar use of the school auditorium for public meetings constituted arbitrary discrimination resulting in abridgment of appellants' freedom of speech and assembly contrary to the equal protection clause of the Fourteenth Amendment. (8a-10a)

The appellees demurred to the complaint on twelve grounds. (16a-19a) The main objection to the complaint was that it appeared that appellants were a religious organization and that the law of Pennsylvania did not permit the use of school auditoriums by religious organizations for the proposed sectarian purposes. (16a-19a) The Court of Common Pleas sustained the demurrer and ordered the relief prayed for by the appellants refused and discharged the alternative writ of mandamus theretofore issued. (31a) An opinion was written by the Court of Common Pleas. (21a-31a)

The appeal was taken directly to the Supreme Court of Pennsylvania on constitutional grounds. (2a, 33a)

The Questions Are Substantial

There has been discrimination against appellants in violation of the equal protection clause of the Fourteenth Amendment.

The action of the appellees in denying the permit and the order of the courts below in refusing to hold that appellants were entitled to the writ of mandamus failed to give proper effect to and are not in harmony with applicable decisions of the Supreme Court of the United States as to equal justice under the law. The action here complained of violates the equal protection clause and the due process clause of the Fourteenth Amendment to the United States Constitution.

The decisions of the courts below are in direct conflict with *Niemotko* v. *Maryland*, 71 S. Ct. 325. In that case this Court condemned discrimination practiced by the officials of Havre de Grace in denying an application for a permit by Jehovah's witnesses to hold a religious assembly in the public park. The Chief Justice, for the Court, said:

"The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body. . . .

"It thus becomes apparent that the lack of standards in the license-issuing 'practice' renders that 'practice' a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permit was a denial of equal protection." 71 S. Ct. at page 328.

Mr. Justice Frankfurter, concurring in the judgment of the Court, among other things, said:

"To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment." 71 S. Ct. at page 334.

The holding of the court below conflicts with *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 390. In that case the Court said: "The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reason-

able relation to the subject of the legislation." 277 U. S. at page 402.

It is apparent that the classification of assemblies that may be held in the public schools so as to exclude religious assemblies while allowing political assemblies is not consistent with the equal protection clause because there is no "real and substantial difference having reasonable relation" to the use of the school auditorium. An assembly is an assembly regardless of its type. The appellees do not have the right to censor assemblies by saying one type of assembly can be held while another can not be had. Prior censorship of the exercise of the right of public assembly has been condemned by this Court. *Hague* v. *C. I. O.*, 307 U. S. 496; *Saia* v. *New York*, 334 U. S. 558; *Niemotko* v. *Maryland*, 71 S. Ct. 325.

The erroneous interpretation of the equal protection clause of the Fourteenth Amendment by the court below in this case disrupts and disorganizes completely throughout the United States the uniform practice of using school auditoriums for civic center purposes at times when not used by the schools. For over one hundred years it has been the general practice, with or without legislative authority, to permit school buildings, when not being used for educational purposes, to be used for the discussion of community, state and national problems.

Included among such users, especially in the rural districts, have been and are the religious organizations. In many communities there are no buildings where religious assemblies may be had unless the school is made available. Necessity, practice, usage, custom and statute throughout this country have made available the school auditoriums for religious gatherings when the schools are not using them. On the pretext that such use is not permitted while permitting political assemblies the appellees and the court

below have upset, flouted and denied this general custom and need which have been widely practiced and never constitutionally doubted. This denial has been on the theory that the use of the school auditorium by religious groups constitutes appropriation of public property for sectarian purposes contrary to the prohibition of such found in the state and federal Constitutions.

It would be unreasonable to suppose or to contend that the framers of the First and Fourteenth Amendments had in mind discriminating against the religious organizations in holding public assemblies. The interpretation of the First Amendment contended for by the court below requires this Court to discriminate against religious assemblies in favor of all other types of assemblies. This Court should not write into the First and Fourteenth Amendments discrimination against religious assemblies under the guise of the sophisticated doctrine advanced by the court below, which is an unlawful stretching of the principle of the separation of church and state. A factitious conclusion would be reached by so doing, which is forbidden by the Constitution. Indeed the Court would be discriminating against the religious organizations and misinterpreting the guaranty of freedom of assembly appearing in the First Amendment.

The Supreme Court of Wisconsin, in a case involving identical issues as those involved here rejected the contention that religious assemblies could be forbidden on public property while other assemblies were allowed. An ordinance of the County of Milwaukee in reference to the use of public parks which forbade the holding of religious assemblies in the public parks was held to be an unconstitutional abridgment of freedom of assembly claimed by Jehovah's witnesses. *County of Milwaukee* v. *Carter,* 45 N. W. 2d 90. In that case the court said that if the Consti-

tution or laws of Wisconsin restricted the use of public property so as to exclude religious assemblies, "such restriction would be void because in conflict with and subordinate to the First and Fourteenth Amendments of the United States Constitution which neither make nor recognize any such limitation".

The Constitution of Pennsylvania and the Constitution of the United States guarantee freedom of speech and peaceable assembly. *Hague* v. *C. I. O.*, 307 U. S. 496; see also 21 Minn. L. Rev. 744) The right of assembly cannot be effectively expressed without the use of public auditoriums and other meeting places. It was for the purpose of enabling the public schools to have a part in increasing such places of assembly that the legislature of Pennsylvania passed the law which authorized the members of the boards of education to permit school buildings to be used as places of assembly. Prior to the enactment of the sections of the Act authorizing the use of school buildings for public meeting purposes there was no duty on the part of the school board or board of education to permit the use of school property for uses other than school purposes.

The purpose of passing the law in question authorizing the use of school buildings in Pennsylvania was to free the school boards and people who desired to use the auditoriums from the restraint of *Bender* v. *School Directors of Manor Township,* 182 Pa. 251, and *Hysong* v. *School District of Gallitzin,* 164 Pa. 629, which held that there was no legislative authority to authorize religious organizations to use the public schools, according to *Ristine* v. *School District of Philadelphia,* 26 D. & C. 655. Concerning these holdings the court said:

"The decisions in *Hysong* v. *Gallitzin Borough School District et al.,* 164 Pa. 629, and *Bender* v. *Streabich et al., etc.,* 182 Pa. 251, upon which the plaintiffs rely, are not

controlling. These cases were decided some years before the Act of May 18, 1911, P. L. 309, and what was therein stated by the court, to which the plaintiffs refer, must necessarily be considered in the light of the later act of assembly, which was a codification of the law pertaining to public schools and extended and defined the powers of school districts and their boards of directors." (26 D. & C. 655, 662-663.)

The Act (P. L. 309, May 18, 1911) among other things provides that the "board of school directors of any district may permit the use of its school grounds and buildings for social, recreation and other proper purposes, under such rules and regulations as the board may adopt, . . ." The use of the word "may" in the act did not mandatorily open the schools but merely allowed the boards to permit the schools to be used for such purposes in their discretion. "May" is permissive. See *Connell* v. *Board of School Directors of Kennett Township*, 356 Pa. 585.

The use of the word "may" in the law twice does not weaken the position of the appellants. The act by use of that word merely allowed the boards to decide whether they will permit their schools to be used at all for community assembly purposes. The boards were given the right to decide whether the school would be permitted to be used for any outside purpose. Each board was allowed to say whether its school or schools would be opened for social, recreational and other proper purposes.

The boards were given by the law the option to keep their doors closed to outside purposes or to open them. Once they were opened the exercise of the authority conferred by the statute must be fairly and equally administered and used. If, as and when the appellees opened their buildings for purposes of meetings they were limited by law in the exercise of their discretion. The law confined

the appellees to reasonable rules and regulations as to time and manner of community use of such buildings. It did not confer on them the power to arbitrarily exclude one class of permissive use of the auditoriums while allowing another class of permissive use. It was their duty to make the buildings available to all classes of persons when they were made available to any one group for meeting purposes.

The law of Pennsylvania, which permits school districts and boards to allow school property to be used as community meeting places, puts the use of such property on the same basis as the use of public parks. It is unconstitutional to deny the use of such public places to persons who desire to hold meetings therein. *Hague* v. *C. I. O.*, 307 U. S. 496; *Sellers* v. *Johnson*, 163 F. 2d 877 (C. A. 8); *Massachusetts* v. *Gilfedder*, 321 Mass. 617; *Niemotko* v. *Maryland*, 71 S. Ct. 325.

Before the various states enacted the "Civic Center Statutes" that are to be found throughout the United States at this time, there was a conflict in authority in respect to the use of school buildings for purposes of civic and social meetings and public assemblies. The decisions have been explicitly collated and discussed in 7 A. L. R. 791, 52 A. L. R. 249 and 86 A. L. R. 1181. Also during this period of time there was a conflict among the various jurisdictions in the United States in respect to the legality of the use of public school buildings for religious assemblies. (5 A. L. R. 886, 86 A. L. R. 1181, 141 A. L. R. 144)

The enactment of the statute which permits the use of school buildings for civic center meeting purposes and other non-school purposes frees the Court of the burden of considering the conflict of authority as to use of schools for such purposes. The constitutionality of statutes similar to the one relied upon by the appellants in this case has

been sustained as valid and the statutes have been held to be valid. See the cases discussed in 161 A. L. R. 1300.

Supporting these decisions, the most recent case in the United States, directly in point, is that of *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885. See also *Ellis* v. *Board of Education*, 27 Cal. 2d 332, 164 P. 2d 1. (For earlier cases and a discussion of the subject generally, see 161 A. L. R. 1308-1396; 86 A. L. R. 1195-1204; 5 A. L. R. 886-890; 47 Am. Jur. 344-346, 452-454) In the *Danskin* case the plaintiffs applied for permission to use the high school auditorium. The request was denied by the school district. The Civic Center Act made the school building open for political and other meetings. The refusal was based on a statute which forbade the use of such buildings for public meetings unless the organization submitted proof that it was not subversive. The plaintiffs refused to make the necessary proof in connection with their application for the use of the auditorium. The Supreme Court of California, in an original action for mandamus, directed that the peremptory writ of mandamus issue because the refusal was an abuse of discretion and a denial of constitutional rights.

The decision in the *Danskin* case was noted and commented upon favorably in 31 Minn. L. Rev. 199-201 and 14 U. Chi. L. Rev. 27-281.

It is well settled that discrimination is a violation of the equal protection clause of the Fourteenth Amendment. Permitting other groups to hold assemblies in the auditorium in question for similar purposes while denying such use to Jehovah's witnesses, constitutes a denial of the equal protection of the laws required by the Fourteenth Amendment. This discrimination by the administrative agency and the approval thereof by the court below are out of harmony with and are in conflict with *Skinner* v. *Oklahoma*,

316 U. S. 535 and *Yick Wo* v. *Hopkins,* 118 U. S. 356. The latter decision held: "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution." 118 U. S. at page 374. See also *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 350, and *Nixon* v. *Condon,* 286 U. S. 73, 89.

The interpretation of the Federal Constitution by the appellees and by the court below is in conflict with *Hannegan* v. *Esquire,* 327 U. S. 146, holding that a privilege, as distinguished from a right, may not be taken away from a person on arbitrary and capricious grounds. The position here taken, that the decision of the court below and the rule of the appellees are in conflict with the holding of the Court in *Hannegan* v. *Esquire,* 327 U. S. 146, is supported by the California Supreme Court in *Danskin* v. *San Diego Unified School District,* 28 Cal. 2d 536, 171 P. 2d 885. In that case the action was for mandamus to compel a school board to grant permission to use a school auditorium with condition that the applicants sign a loyalty oath. They contended that the oath statute was void on its face because it abridged the Constitutions of California and the United States.

It is impossible to reconcile the decisions of the courts below and the decision of this Court in *Niemotko* v. *Maryland,* 71 S. Ct. 325, which controls. While there is initially a difference between the right to use a park and the right to use a public building because the one is open and the other is covered by a roof, no difference exists when, by

law as here, the roof has been raised off the building and the property thrown open to the public under regulations, as is a public park. The courts below stumbled over this obvious fact and disregarded completely the long line of decisions by this Court that are applicable. See *Saia* v. *New York*, 334 U. S. 558, *Niemotko* v. *Maryland*, 71 S. Ct. 325.

The exercise of discretion can be reviewed by mandamus where there has been a misinterpretation of the law of the land by the administrative agency.

The showing that an administrative agency has overridden the law or has exercised its authority in an unreasonable manner gives jurisdiction to the Court of Common Pleas to review by mandamus an administrative denial of a permit. *Mielouszny* v. *Rosol*, 316 Pa. 91, 93-94.

The holding by the court in *Johnson* v. *State Board of Veterinary Medical Examiners*, 46 Pa. Super. Ct. 279, 285, is applicable here. There the holding was that if the judgment or discretion of the administrative agency was abused, or if "there is a mistaken view of the law as applied to the admitted facts of the case, the writ will issue to compel action according to law." The decision in *Downing* v. *School District of the City of Erie*, 360 Pa. 29, 61 A. 2d 133, at pages 135-136, supports this position of the appellants. In that case the court said: "the power of the courts in such cases is exceedingly limited, and they are permitted to interfere only where it is made apparent that it is not discretion that is being exercised but arbitrary will or caprice . . . if the facts admit of no other conclusion than that the determination of the board has been influenced by other considerations than the public interests, no matter what these may have been, the law will regard it as an abuse of power, a disregard of duty,

and it becomes the duty of the courts to interfere for the protection of the public." *Lamb* v. *Reading, supra,* page 484, 485 of 234 Pa., at page 363 of 83 Atl. . . . As the learned chancellor pointed out in the original adjudication, while courts will not interfere with the exercise of discretionary powers by public officials, if it appears that their action is based on a misconception of law or is the result of arbitrary will or caprice, equity will intervene to prevent an abuse of the intrusted power adverse to the public welfare. *Hibbs* v. *Arensberg,* 276 Pa. 24, 26, 119 Atl. 727." *Downing* v. *School District of the City of Erie,* 360 Pa. 29, 61 A. 2d 122, at pages 135, 136.

Conclusion

Wherefore the Supreme Court of the United States should note jurisdiction for final hearing for the purpose of determining whether or not there has been a departure by the courts below from the usual and accepted practice and which have disposed of important and substantial questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the Supreme Court of the United States.

Respectfully submitted,

HAYDEN C. COVINGTON,
WALTER W. RIEHL,
Attorneys for Appellants.

APPENDIX

(168)

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 24. March Term, 1950

THOMAS A. MCKNIGHT, WILLIAM MCKNIGHT, HARRY W. FAHL, JOSEPH J. PETTI, CHARLES H. STEWART, JR., JUDD H. GRANT, H. ROBERT DAWSON, WILLIAM J. TORSO, AND MICKEY ROMANSKY, Appellants.

v.

THE BOARD OF PUBLIC EDUCATION, B. H. KIRKPATRICK, J. H. BIALAS, DR. A. L. LEWIN, DR. LAWRENCE E. VAN KIRK, GEORGE E. WALTERS, MRS. WILLIAM C. RIDGE, JUDGE JAMES H. GRAY, MRS. J. K. B. HARE, A. REX FLINN, MRS. F. B. CHALFANT, J. ROY DICKEY, W. H. COSGROVE, G. W. GERWIG, LAURA M. BRAUN, AND HOMER S. BROWN.

Appeal from the Judgment of the Court of Common Pleas of Allegheny County at No. 1552 January Term, 1949 D.

OPINION OF THE COURT

Filed November 13, 1950

CHIDSEY, J.

Thomas A. McKnight, and others, appellants, members of the Jehovah's Witnesses, instituted this action in mandamus against the members of the Board of Public Education of the City of Pittsburgh to compel issuance to them of a permit for the use of the Schenley High School Auditorium on four Sunday afternoons for the purpose of conducting a series of public Bible lectures. Appellees filed preliminary objections to the complaint in mandamus

asserting, *inter alia*, that the complaint established that the intended use of the premises was for religious purposes contrary to the effective rule of the board prohibiting granting of a permit for "any religious or sectarian purposes". This appeal is from the order of the court below sustaining the preliminary objections and from entry of judgment for appellees.

The complaint avers that appellants are Jehovah's Witnesses; that they had planned a series of regular public talks on national and international conditions from a Bible standpoint by chosen speakers in the public school auditorium of Schenley High School in the City of Pittsburgh; that by letter dated September 27, 1948, they requested use of said auditorium for a series of public lectures on four Sunday afternoons, October 10, 17, 24 and 31 from 1:00 p.m. to 5:00 p.m. each afternoon; that they offered to pay the prevailing rental charges; that on September 30, 1948, they were advised by H. W. Cramblet, assistant secretary of appellee school board, that it was impossible to grant the request in view of a rule adopted by the school board which provided: "Permits shall not be granted to anyone for any religious or sectarian purpose"; that denial to them and permission to others to have use of the same auditorium for public meetings constituted arbitrary discrimination, denying to appellants the right of due process of law under the Fourteenth Amendment of the Constitution of the United States, as well as under the Constitution of the Commonwealth of Pennsylvania; that the laws of Pennsylvania provide for use of school auditoriums as public meeting and assembly places upon application by responsible citizens and residents of the community where the school is located; that appellants' request was in compliance with the statutory requirement; that appellees had a legal ministerial duty to issue the requested permit to appellants, but arbitrarily refused to do so; that denial to appellants of the requested permit amounts to an unconstitutional application of the Pennsylvania statute and authorizes said board to permit the use of schools in an unconstitutional manner, and, that appellants have no other adequate and complete remedy.

A writ of alternative mandamus issued forthwith, returnable November 15, 1948. Subsequent thereto, on November 10, the return day of the writ of alternative mandamus was extended to November 22, 1948. Appellees, on November 19, 1948, filed "Preliminary Objections by Way of Demurrer" averring that appellants are a religious cult or sect; that the desired use of the school auditorium facilities was for religious or sectarian purposes; that there is no averment in the complaint that others were permitted to use the school auditorium for the purpose of holding religious or sectarian meetings; that appellants did not challenge the legality or the reasonableness of the rule of the board prohibiting the granting of permits for use of public school buildings for religious or sectarian purposes; that the laws of Pennsylvania provide, with regard to the use of school auditoriums as public meeting and assembly places, that the board of school directors may permit the use thereof for "social, recreation, and other purposes, under such rules and regulations as the Board may adopt"; and, that the complaint clearly discloses that appellees acted in a legal manner, in compliance with the Constitution and laws of the Commonwealth of Pennsylvania and without violating any constitutional rights of appellants.

Appellants contend that (1) the words "and other proper purposes" include religious and sectarian purposes, and (2) although the grant of power to the board to permit use of the auditorium was permissive and not mandatory, denial of use of the auditorium to appellants while permitting it to others, although for non-sectarian or non-religious purposes, effected a denial of equal protection of the laws in that there could not be conferred on the board "power to arbitrarily exclude one class of permissive use of the auditorium while allowing another class of permissive use. It was their duty to make the buildings available to all classes of persons when they were made available to any one group for meeting purposes."

Appellees contend that (1) religious and sectarian purposes are not within the scope of the words "social, recrea-

tion, and other proper purposes"; and (2) the rule represents a proper exercise of discretion.

The Act of May 18, 1911, P.L. 309, Section 627, as amended by the Act of March 31, 1927, P.L. 87,[2] is the source of the power exercised by appellees. This Act provides: "The board of school directors of any district may permit the use of its school grounds and buildings for social, recreation, and other proper purposes, under such rules and regulations as the board may adopt, and shall make such arrangements with any city, borough, or township authorities for the improvement, care, protection, and maintenance of school buildings and grounds for school, park, play, or other recreation purposes, as it may see proper, and any board of school directors may make such arrangements as it may see proper with any officials or individuals for the temporary use of school property for schools, playgrounds, social, recreation, or other proper educational purposes, primaries and elections."

Pursuant to the above provisions of the School Code, appellees adopted Section 416 of its rules and regulations quoted above. The legislature has delegated to the board of school directors of any school district the power to permit use of the school grounds and buildings for certain proper purposes under such rules and regulations as the board may adopt. Judicial review of the actions of a board must be restricted to the reasonableness thereof: *Regan, et al.* v. *Stoddard, et al.*, 361 Pa. 469, 65 A. 2d 240; *Sunbury School District*, 335 Pa. 6, 6 A. 2d 279; *Wilson* v. *School District of Philadelphia*, 328 Pa. 225, 195 A. 90. It cannot encompass consideration of the wisdom of the action taken.

Whether the school property shall be used by any group at all is a matter resting within the discretion of each board of school directors. This court is not a superboard of school directors in performance of an official duty. The

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[2] This Act was specifically repealed by the Act of March 10, 1949, P.L. 30, Art. XXVII, Section 2701. It has been reenacted almost verbatim by Art. VII, Section 775 of that Act, and further amended by the Acts of April 14, 1949, P.L. 460, Section 2, April 21, 1949, P.L. 702, Section 1, and May 12, 1949, P.L. 1278, Section 1, 24 PS Section 7-775.

legislature has delegated this power to the school boards, not to the courts. In the absence of any proof of unreasonableness or an arbitrary or capricious exercise of the power, the judgment of the board must stand.

Appellants do not deny the existence of the discretion in the use of the power. They contend, however, that permission must be given to all or none, and that exercise of the power cannot be partial, but must be complete. There is nothing in the statute, nor do we know of any rule of statutory construction which supports such a contention. To the contrary, the principle is so well established as to need no citation of authority that unless the delegation of power to a given body or person contains specific restrictive language, no obligation or requirement is imposed requiring that the power be exercised in full or not at all. Exercise of less than the full power may be successfully challenged only where it can be shown that it has been exercised in an arbitrary, capricious, or discriminatory manner. The burden of showing such clear abuse of discretion is a heavy one.

Appellants, in their complaint, have failed to sustain this burden. The complaint does not contain any averment that any group has been accorded use of the premises for religious and sectarian purposes. A finding that any other person or persons similarly situated has been permitted the use which has been denied to appellants could not properly be made. There is nothing in the complaint which would warrant a finding that the exercise of the power by the school board was unreasonable or arbitrary.

In holding that no facts have been averred in the complaint establishing abuse of discretion by the board, it becomes unnecessary to determine at this time the scope of the words "and other proper purposes", and "other proper educational purposes".

Judgment affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 649

THOMAS A. McKNIGHT, WILLIAM McKNIGHT, HARRY W. FAHL, ET AL.,

Appellants,

vs.

THE BOARD OF PUBLIC EDUCATION, B. H. KIRKPATRICK, J. H. BIALAS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

MOTION TO DISMISS

J. Roy Dickie,
Mortimer B. Lesher,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 649

THOMAS A. McKNIGHT, WILLIAM McKNIGHT, HARRY W. FAHL, JOSEPH J. PETTI, CHARLES H. STEWART, JR., JUDD H. GRANT, H. ROBERT DAWSON, WILLIAM J. TORSO, AND MICKEY ROMANSKY, *Appellants,*

v.

THE BOARD OF PUBLIC EDUCATION, B. H. KIRKPATRICK, J. H. BIALAS, DR. A. L. LEWIN, DR. LAWRENCE E. VAN KIRK, GEORGE E. WALTERS, MRS. WILLIAM C. RIDGE, JUDGE JAMES H. GRAY, MRS. J. K. B. HARE, A. REX FLINN, MRS. F. B. CHALFANT, J. ROY DICKEY, W. H. COSGROVE, G. W. GERWIG, LAURA M. BRAUN, AND HOMER S. BROWN, *Appellees*

MOTION TO DISMISS THE APPEAL

Appellee moves the Honorable Court to dismiss this Appeal and sets forth its reasons, as follows:

1. The Act of Assembly of Pennsylvania of May 18, 1917, Pennsylvania Pamphlet Laws 309, as amended by the Acts of May 20, 1921, P. L. 958, and March 31, 1927, P. L. 87, known as Pennsylvania School Code (Section 627), provides for a lawful delegation by the Pennsylvania Legisla-

ture to the Board of School Directors of any school district in Pennsylvania of the power to permit use of the school grounds and buildings for certain proper purposes under such rules and regulations as the Board may adopt and, as enforced by the Appellees, is not repugnant to the First and Fourteenth Amendments to the United States Constitution.

2. The Act as it has been construed and applied by Appellee does not discriminate arbitrarily against Appellants and in favor of others in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

In support of the foregoing, Appellee asserts:

Pursuant to the aforesaid provision of the Pennsylvania School Code, as amended, Appellee adopted a Board Rule as to use of school property, designated as Section 416 of the Rules of the Board of Public Education of Pittsburgh, which Rule is as follows:

> "Permits shall not be granted to anyone for any religious or sectarian purpose."

This Rule applies to anyone and everyone where religious or sectarian purposes are involved. The Pennsylvania Legislature said that the Board of School Directors of any district *may* permit the use of school grounds and buildings for certain proper purposes *under such rules and regulations as the Board may adopt,* and this Appellee did. (Emphasis ours). Whether the school property shall be used by any group at all is a matter resting within the discretion of each Board of School Directors. In the absence of any proof of unreasonableness or an arbitrary or capricious exercise of the power, the judgment of the Board must stand. Judicial review of the action of a Board must be restricted to the reasonableness thereof, and it cannot en-

compass consideration of the wisdom of the action taken. Appellee did not act arbitrarily, capriciously and with gross abuse of discretion in denying the application of Appellants. *Regan et al.* v. *Stoddard,* 361 Pa. 469; *Sunbury School District,* 335 Pa. 6; *Wilson* v. *School District of Philadelphia,* 328 Pa. 225; *Hibbs* v. *Arensberg,* 276 Pa. 24; *Lamb* v. *Redding,* 234 Pa. 481; *Ristine* v. *School District of Philadelphia,* 26 D. & C. 655 (cited by Appellants); *O'Connor* v. *Hendrick,* 184 N. Y. 421.

Article 10 of the Constitution of Pennsylvania provides for the establishment and maintenance of a public school system within the Commonwealth, and Section 2 thereof provides:

> "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

This prohibition against the use of public funds for sectarian religious purposes also appears in Article 3, Section 18, which must be read in connection with said Article 10. Said Article 3, Section 18, provides:

> "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community nor to any denominational or sectarian institution, corporation or association."

The use of a school auditorium for religious instruction or religious services is illegal and unlawful under the laws of the Commonwealth of Pennsylvania, and the decisions of the Courts of Pennsylvania. Said Article 3, Section 18 of the Pennsylvania Constitution denies to Appellants the right to use a school auditorium because such use is an appropriation for the support of a place of worship or a denomination. It is the contention of the Appellee that under the decision of your Honorable Court in the case of

People of State of Illinois ex rel McCollum v. *Board of Education of School District No. 71, Champaign County, Illinois, et al,* decided on March 8, 1948, 333 U.S. 203, 68 Supreme Ct. 461, public school buildings may not be used for religious instruction or religious services by anyone or groups of individuals, including public school pupils, when the schools are not in session.

In the *Everson* case, 330 U.S. 1, your Honorable Court said:

> "Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. * * * No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa."

Article 1, Section 3 of the Constitution of Pennsylvania provides:

> "All men having natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; * * * and no preference shall ever be given by law to any religious establishments or modes of worship."

In the face of such language, how can anyone say that the Rule as laid down by the Appellee in this case is arbitrary? If Appellee, itself, cannot use school property for religious purposes, how can it permit others to use school property for such purposes? Appellee asserts that a taxpayer could probably enjoin it from permitting Appellants to use of the auditorium, if it granted them a permit.

Considering the foregoing, the Appellants have not been deprived of their civil rights under the Rule. It is perhaps laboring the obvious and oft repeated—to state that the

constitutional guarantee of freedom of speech is not an absolute right to be indiscriminately exercised under all circumstances and conditions.

It must be emphasized that Appellants did not attack the legality, the lawfulness or the reasonableness of the Rule of Appellee. Appellants did not deny the existence of the discretion in the use of the power of Appellee. Appellants contended that permission must be given to all or no one, and that exercise of the power cannot be partial but must be complete. The Statute does not support such reasoning.

Most, if not all, of the cases cited by Appellants are not analogous and are not in point. In no one of them, did a question arise such as in this case. Here, Appellants would have your Honorable Court say that the First and Fourteenth Amendments to the Federal Constitution were violated because Appellee followed and enforced the provisions of the Federal and Pennsylvania State Constitutions and followed and applied the decisions, both Federal and State. For example, the case of *Hague* v. *C.I.O.*, 307 U.S. 496, cited by Appellants, was referred to in the case of *Commonwealth* v. *Hessler* (Jehovah's Witness case), 15 A. 2d 486, by President Judge Keller of the Superior Court of Pennsylvania. He affirmed on the Opinion of the Lower Court, who said:

> "Even the Hague case enunciates the well established principle that the privilege of a citizen of the United States to use streets and parks is not absolute but relative and must be exercised in subordination to the general comfort and convenience and consonant with peace and good order."

In the case at bar, we have a school building and not streets or parks; no arbitrary action such as in the Hague case, but a reasonable rule and regulation adopted pursuant to legislative authority, properly enforced and carried out as

to religious uses in compliance with the provisions of the Federal and Pennsylvania Constitutions and the Federal and State decisions.

The recent decision of *Niemotko* v. *Maryland*, 71 Supreme Ct. 325, has been cited by Appellants. This case is readily distinguishable from the case at bar. In that case a public park was involved, and there was no ordinance prohibiting or regulating use of the park without a permit. The Opinion of your Honorable Court was written by Chief Justice Vinson, who said, inter alia:

> "In this Court, it is argued that State and City officials should have the power to exclude religious groups, as such, from the use of public parks. But that is not this case. For whatever force this contention could possibly have is lost in the light of the testimony of the Mayor at the trial that within his memory permits had always been issued for religious organizations and Sunday School picnics."

In his concurring opinion, Justice Frankfurter said, inter alia:

> "The City allowed other religious groups to use the park. To allow expressions of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."

In the case at bar, Appellants cannot say that permits under said Rule 416 were granted to anyone for any religious or sectarian purpose and denied to them.

Respectfully submitted,

J. Roy Dickie;
Mortimer B. Lesher,
Solicitor, School District of the City of Pittsburgh, Pa., Appellee.

(4005)

No. 649. McKNIGHT ET AL. *v.* BOARD OF PUBLIC EDUCATION ET AL. Appeal from the Supreme Court of Pennsylvania. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Hayden C. Covington* for appellants. *J. Roy Dickie* for appellees. Reported below: 365 Pa. 422, 76 A. 2d 207.